the court will be prepared to modify the *prima facie* position, which is that the amount for which the person concerned has stood surety will be forfeit in full."

Thus, because of the serious nature of the obligation, it cannot be said:

"the mere fact that every effort to secure the appearance of the accused man had been made and that there was no want of diligence involved the proposition that the amount of the obligation should be remitted entirely."

per Donaldson L.J. in *Ex p. Parfrey (supra).*

What degree of diligence has the surety shown in this case? On a scale of 10, probably one. He had merely asked the appellant when the new date of hearing was and on being told that it had not been given yet, he went to New York. The notice of hearing was sent to his home address. In his evidence, he has not denied receiving it. During his long sojourn overseas, he appeared to have done nothing at all to keep in touch with the appellant or his son to ensure that any official communication as to the next hearing date was transmitted to him. In contrast, he was able to and did communicate with his son in respect of the notice dated April 28, 1987 to show cause. There was therefore no excuse at all.

This is not an exceptional case for remitting any part of the penalty. The surety must pay the full sum of $5,000.

Order accordingly.

Solicitors: *Ng Lee & Partners.*

A **BRUNEI REPORT**

KOK SONG KONG v. BRUNEI SHELL PETROLEUM COMPANY BERHAD

[A.C.J. (Roberts C.J.) August 7, 1987]

B **[Bandar Seri Begawan – Civil Appeal No. 1 of 1987]**

Civil Procedure – Limitation – Negligence – Action for damages – Whether action time-barred – When action commences – Whether action commences when writ is stamped and issued or anytime earlier – Limitation Act C *(Cap. 14).*

The plaintiff, who was involved in an accident on April 20, 1981, sought damages from the defendant for injuries to him caused by the negligence of the defendant. Pursuant to his claim, a writ in the action was presented at the Supreme Court Registry for filing and issue on April 18, 1984. The writ bears the seal of the court, the signature D of the Chief Registrar and the date stamp for April 23, 1984.

Owing to the fact that the writ was stamped April 23, 1984, a preliminary point of law was raised as to whether the proceedings in the suit was barred by reason of the provisions of the Limitation Act (Cap. 14). The crux of E the present case was whether the action was commenced when the writ was stamped and issued or whether it commenced anytime earlier.

Held: (1) the court had no doubt that this suit was instituted when the writ was issued;

(2) the defence of limitation must succeed and the F plaintiff's action must therefore be dismissed by virtue of section 3 of the Limitation Act.

Cases referred to:

(1) *Boota Singh* v. *Isman Bin H. Ali* [1957] M.L.J. 127.

(2) *Jumatsah bin Daud* v. *Voon Kin Kuet* [1981] G 1 M.L.J. 254.

CIVIL APPEAL.

D. S. Sandhu for the plaintiff.
David Howell for the defendant.

H *Cur. Adv. Vult.*

Roberts C.J.: I have been asked to decide a preliminary point of law, namely, whether the proceedings in Civil Suit No. 82 of 1984 are barred by reason of the provisions of the Limitation Act I (Cap. 14). The plaintiff, who was involved in an accident on April 20, 1981 sought damages from the defendant for injuries to him caused by the negligence of the defendant.

On April 18, 1984, a writ in the action was presented at the Supreme Court Registry for filing and

issue. The writ itself bears the seal of the court, the signature of the Chief Registrar and the date stamp for April 23, 1984.

By section 3 of Cap. 14, "every writ instituted after the period prescribed therefor by the Schedule" shall be dismissed if limitation has been set up as a defence, which it has been in this case, as a result of an amendment to that effect for which the Registrar gave leave on July 4, 1987.

By virtue of item 92 of the Schedule to the Limitation Act (Cap. 14), the period of limitation for an action for compensation for injury to the person is three years from the day when the injury was committed. By section 11 of Cap. 14, the day on which the cause of action arose is excluded from the three-year limitation period, which therefore expired on April 20, 1984.

Institution of writ

The first question to be determined, therefore, is when a suit can be said to have been instituted. As to this, I rely upon a Singapore case of *Boota Singh* v. *Isman Bin H. Ali*[1] in which Whyatt C.J. commented:

"The expression 'suit instituted' is synonymous in my view with 'action commenced' an expression which is frequently found in Ordinances and Rules of Court and if there were any doubt on the point, it would, in my opinion be disposed of by the judgments in *Hood Barrs* v. *Cathcart* [1894] 3 Ch. 376. In that case the court was called upon to construe the words 'any proceeding instituted' and in the course of his judgment Lopez L.J. said 'the expression proceeding instituted conveys to my mind the idea of some action commenced'. Likewise Davey L.J. in a concurring judgment expressed the view that 'instituted' was an apt word to apply to the commencement of a suit. The issue between the parties in this case, therefore, resolves itself into an inquiry as to when, technically speaking, an action is commenced. So far as proceedings in the High Court are concerned, it is never, as far as I am aware, been questioned that the issue of the writ of summons commences an action. This is confirmed by a note in the Annual Practice 1957, at page 13, where it is stated, 'when the writ is sealed it is deemed to be issued and the action is then commenced'."

I respectfully agree with the reasoning and the conclusion of the Chief Justice. I have no doubt that this suit was instituted when the writ was issued. The question I have to decide is whether it was issued, as been submitted on behalf of the plaintiff, when the writ was presented to the registry on April 18, or on the date on which, on the face of the writ, it was dated stamped and issued by the registry.

Order 5 of the Brunei High Court (Civil Procedure) Rules sets out the procedure which has to be followed on the issue of a writ.

By Order 5 rule 1, the duty is placed on the plaintiff or his advocate to present a writ of summons for sealing. This he does by leaving a copy of the writ with the Chief Registrar. By Order 5 rule 2, "the Chief Registrar shall assign the serial number of the writ and shall file the copy, and shall seal the writ with the seal of the court, and thereupon the writ shall be deemed to be issued."

The plaintiff has, understandably, placed considerable reliance on the Malaysian case of *Jumatsah bin Daud* v. *Voon Kin Kuet.*[2] There are certain similarities between the facts of this case and the facts in *Jumatsah.*

In *Jumatsah,* an accident occurred on November 6, 1974; a writ of summons was presented to the Registry in Kuching on November 2, 1977, that is to say, inside the three-year limitation period, but the writ of summons itself, when issued by the Registry, bore the date November 14, 1977 which was outside the limitation period.

Chong Siew Fai J. ruled that by reason of the provisions of Order 2 rule 8 of the 1957 Malaysian Rules of the Supreme Court, a writ should be dated on the day on which the writ was filed and the filing fee was paid and ordered that the writ should be amended by deleting 'the 14 November, 1977' which appeared on it and replacing it with the '2nd November, 1977'.

With respect to the judge, and I am not bound by his decision in any way, I found some of his reasoning difficult to follow. He seeks to distinguish *Boota Singh's* case, to which I earlier referred, by commenting that in *Boota Singh's* case no question arose as to the time of presenting the summons to the court and that it was not known when the summons was presented for sealing.

That, in my view, is a misreading of the facts of *Boota Singh* since it is clear from the report that the plaintiff had requested the summons clerk at the District Court concerned to prepare a summons before the limitation period had expired although the summons was only issued by that court after its expiry.

In any event, *Jumatsah* was based on rules which are not in identical terms to the relevant Brunei rules. The Malaysian rules did not contain

an equivalent provision to Order 5 rule 2, which states that when the Chief Registrar has assigned the serial number, filed the copy and sealed the writ with the seal of the court, *thereupon the writ shall deemed to be issued.* So the Brunei rule states in specific terms that it is only after the Registrar has fulfilled the duties imposed upon him by that rule that the writ is deemed to be issued.

Mr. Sandhu submitted that, because the writ was presented to the Chief Registrar on the 18th, it should have borne that date. According to him, there have been varying practices in the registry. At times it has been the custom to date writs on the date when they were presented even if they were not stamped by the Registrar until a later date. This seems to me to be an improper practice but one which is very understandable, the Chief Registrar taking the view, no doubt, that plaintiffs should not be prejudiced by any slowness in the registry procedures.

In this instance, however, it is suggested that the writ was post-dated but I can find no reason, and none has been suggested to me, as to why a writ which was sealed on or about April 20, should be dated the 23rd. If I had been satisfied by evidence that the writ was sealed and therefore issued on April 20, and that the affixing of a date stamp for April 23 was a mistake, it would have been open to me, under Order 63 of the Brunei rules, to make a suitable amendment to the date; but there is no such evidence.

As an alternative, Mr. Sandhu argued that it was open to me to exercise the powers in that same rule on the ground that the rules have not been complied with. Order 63 rule 1 does permit a judge, where there has been non-compliance with any of the rules, to set aside proceedings in whole or in part as irregular or to amend them or otherwise deal with them in such manner or on such terms as he may think fit, where there has been a non-compliance.

The difficulty Mr. Sandhu faces is to establish that there has been a non-compliance with any of the rules. To permit there to be a gap of three working days between presentation of a writ and its issue is an undesirable practice, but the rules do not themselves oblige the registry or the Chief Registrar to perform any of the acts specified in Order 5 within any specified limit of time, though clearly it is desirable that a writ should be issued either on the day on which it is presented or as soon as possible thereafter.

There is no evidence before me of any failure to comply with any of the provisions of Order 5. They were complied with, though not with the speed which is desirable.

Not without considerable regret, since I feel a degree of sympathy for a plaintiff who now finds that his action is barred partly at least because of the failure of the registry to deal with the presentation of the writ as swiftly as was necessary, I find myself obliged by the law, as I interpret it, to come to the conclusion that the defence of limitation must succeed and that the plaintiff's action must therefore be dismissed by virtue of section 3 of the Limitation Act.

Judgment is accordingly given for the defendant.

As the defence of limitation was advanced at a very late stage by the defendant, I consider that there should be no order for costs in the suit.

Order accordingly.

Solicitors: *Sandhu and Company.*